VOON KENG & ORS.

v.

SYKT. MUZWINA DEVELOPMENT SDN. BHD.

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[CIVIL SUIT NO. 22-164-89]
14 FEBRUARY 1990

LAND LAW: *Claim for damages for late delivery - Funds held by stakeholders for plaintiffs and other purchasers - Whether funds may be set off against damages for late delivery - Damages yet to be assessed - Whether the amount sought to be set off can be the total amount claimed by the plaintiffs or is it limited to the amount of the plaintiffs' stake held - No risk of dissipation of assets by the defendants - Hardship to the defendants.*

CIVIL PROCEDURE: *Representative proceedings - Test applicable - Whether plaintiffs members of same class - Whether plaintiffs had a common interest or grievance - Whether relief sought beneficial to all whom the plaintiffs represented - Rules of the High Court 1980, O. 15 r. 12(1) - Rules of the Supreme Court 1965 (UK), O. 16 r. 9.*

All the plaintiffs were the purchasers of houses built by the defendants. The plaintiffs had filed a claim against the defendants for RM498,733.20 which was in respect of agreed statutory damages for late delivery of their houses and for refunds of interest paid due to premature release of monies at the request of the defendant's architect. Pending the hearing of the plaintiffs' claim, the plaintiffs applied for and obtained an *ex parte* order from the Court restraining the defendants from receiving monies to the extent of RM498,733.20 from six entities who held funds for the benefit of the plaintiffs and other purchasers as stakeholders. The defendants sought to set aside or vary the said order and for damages and costs. The defendants submitted *inter alia* that the first plaintiff had no authority to bring the proceedings for the sixty other plaintiffs, the plaintiffs could apply to restrain the defendants from receiving the stakeholders's fund of the relevant plaintiffs whose money was with any one of the six entities and the restraining order was causing the defendants hardship as all the six entities had refused to release any money to the defendants resulting in them not being able to proceed with further construction work.

Held:

[1] In the circumstances of the present case, the plaintiffs were members of the same class, had a common grievance and that the relief sought was in its nature beneficial to all whom the plaintiffs represented and thus the representative action could continue although the amounts due to each of them may well be different in view of the different dates of the sale and purchase agreements.

[2] The plaintiffs were only entitled to set off the amount held by the six entities for the benefit of the plaintiffs and not funds held for the benefit of other purchasers.

[3] It is for the defendants to pay the plaintiffs the difference only after the alleged amounts have been ascertained at a trial.

[4] There was no evidence that there was a risk of dissipation of assets by the defendants. Restraining the defendants from getting the monies due from the six entities in excess of the amounts held for the benefit of the plaintiff would have the effect of a slow down in their activities or possibly a complete standstill in operations making it more difficult for the defendants to pay any damages for late delivery.

[5] As the said entities only held 5% of the purchase price for each of the plaintiffs, the restraining order should therefore be varied to the extent that each entity should only keep the 5% for each purchaser/plaintiff whose stake is with them.

[6] Damages, if any, sustained by either party by virtue of the variation be assessed by the Senior Assistant Registrar.

[Application to totally set aside injunction dismissed. Restraining order varied.]

Cases referred to:
Market & Co. Ltd. v. Knight Steamship Co. Ltd. [1910] 2 KB 1021
Atip bin Ali v. Josephine Doris Nunis & Anor. [1986] CLJ (Rep) 283
Kandasamy a/l Sreenivasagam v. Syarikat Muzwina Development Sdn. Bhd. [1990] 1 MLJ 15
Duke of Bedford v. Ellis & Ors. [1901] AC 1
Smith & Ors. v. Cardiff Corporation [1954] 1 QB 210
SEA Housing Corporation Sdn. Bhd. v. Lee Poh Choo [1982] CLJ (Rep) 305
Loh Wai Lian v. SEA Housing Corporation Sdn. Bhd. [1987] 2 MLJ 1

Legislation referred to:
Rules of the Supreme Court 1965 [UK], O. 16 r. 9
Rules of the High Court 1980, O. 15 r. 12(1), O. 29 r. 1(a)

For the plaintiffs - Lalchand Nathermal; M/s. Lalchand, Nawawi, Phang & Co.
For the defendants - L.A. Gomes; M/s. L.A. Gomes & Co.

JUDGMENT

Abdul Malek Ahmad J:

The plaintiffs had applied, by way of an *ex parte* summons-in-chambers filed on 15 June 1989, for the following orders:

(a) that the defendants by their servants or agent or otherwise howsoever be restrained from receiving monies to the extent of RM498,733.20 from:

1 Hock Hua Bank Berhad, G-14, Jalan Sultan Idris Shah, Bangunan Sri Kinta, Ipoh;

2 Kean Chye & Sivalingam, Advocates & Solicitors, 8-10, 1st Floor, Jalan Station, Ipoh;

3 Cheang Lee & Ong, Advocates & Solicitors, No. 13, Jalan Bandar Raya, Ipoh;

4 C.W. Chew & Co., Advocates & Solicitors, Room 303, 3rd Floor, Bangunan Sri Kinta, Jalan Sultan Idris Shah, Ipoh;

5 Coopers & Lybrand, Level 9, Wisma Maju UMNO, Jalan Sultan Idris Shah, Ipoh; and

6 Abbas & Ngan, Advocates & Solicitors, No. 33-D, 3rd Floor, Jalan Bandar Raya, Ipoh,

(and that the said sum be withheld by these entities until judgment in this matter whereupon the same shall be paid to the plaintiffs or their solicitors;)

(b) that sealed copies of this order be served on the defendants and the six entities affected herein;

(c) that the entities affected by this order do disclose to this Court and solicitors for the plaintiffs the total amount withheld by them and payable to the defendants within seven days of the service of this order on them;

(d) that parties be at liberty to apply generally; and

(e) costs in the cause.

The application had been granted the same day upon a certificate of urgency. The facts deposed to by the first plaintiff in the supporting affidavit which he had made on behalf of all the other plaintiffs were that:

(a) all the plaintiffs were purchasers of the houses built by the defendants;

(b) they had filed a claim for RM498,733.20 against the defendants the details and particulars of which were in the statement of claim;

(c) their claims were for agreed statutory damages for late delivery of their houses and refunds of interest paid due to premature release of monies at the request of the defendants' architect;

(d) the defendants had not made any payments which suggested that they were trying to delay or avoid payments; and

(e) there was a real risk that the defendants may seek payment of these monies from the six entities concerned before judgment could be obtained.

The statement of claim had pleaded that:

(a) the houses should have been completed and vacant possession delivered to the plaintiffs within 24 calendar months from the date of the respective bookings or agreements, whichever is earlier, failing which liquidated damages from day to day at 10% per annum of the purchase price was payable to the plaintiffs;

(b) the defendants had provided the certificate of fitness for occupation by letter dated 10 August 1988 with a letter to the Lembaga Letrik Negara for the supply of electricity to the respective houses;

(c) the date of delivery of vacant possession in law is the date of electricity supply;

(d) the defendants' architect had by a certificate dated 14 January 1988 certified that the houses were constructed to the stage for vacant possession and connection of water and electricity supply as at that date;

(e) in consequence, the plaintiffs' financers had prematurely released the final loan amount to the defendants and stakeholders causing the plaintiffs to pay interest at 10% per annum prematurely and depriving them of their rights to set off all or a major portion of their claim against the defendants;

(f) electricity supply was on 10 August 1988; and

(g) the six entities were withholding the last 5% or thereabouts of the purchase price as follows:

(i) Hock Hua Bank Berhad, Ipoh - for plaintiff No. 30

(ii) Kean Chye & Sivalingam - for plaintiffs No. 14, 24 and 46.

(iii) Cheang Lee & Ong, Ipoh - for plaintiff No. 15

(iv) C.W. Chew & Co., Ipoh - for plaintiff No. 22

(v) Coopers & Lybrand, Ipoh - for plaintiff No. 59

(vi) Abbas & Ngan, Ipoh - for all the remaining plaintiffs.

Annexed to the statement of claim were details of the plaintiffs, lot numbers purchased, dates of booking, purchase price, dates of agreement, dates of legal completion of houses, dates of premature final release, amounts of final release, date of delivery of supply of electricity, periods of delay, periods of premature release and total amounts due. Thirty-five of the plaintiffs had purchased houses priced at RM40,000, one at RM41,000, twenty-two at RM42,500, two at RM50,875 and one at RM56,125. The total to be restrained from being received by the defendants was RM498,733.20.

By a summons-in-chambers filed on 14 July 1989, the defendants sought to set aside or vary the order given on 15 June 1989 and for damages and costs. After a number of adjournments to enable either one party or the other to file an affidavit in reply, the matter was finally heard on 29 December 1989. On 19 January 1990, I dismissed the application but ordered that the sum to be retained by each of the six entities should only be 5% of the stakeholder's amount for the relevant plaintiff whose money is with them. The Senior Assistant Registrar was also directed to assess damages, if any, occasioned by the variation of the said order. It is against this decision that the plaintiffs have now appealed.

The arguments advanced by learned Counsel for the defendants were that:

(a) the first plaintiff had no authority to file the claim for the sixty other plaintiffs;

(b) the claim for RM498,733.20 was highly exaggerated considering the different dates of the sale and purchase agreements, the fact that no deduction was made for the interest on the late payment of the progress payments and for the commitment fees payable by the plaintiffs to the financers, and that the plaintiffs had taken the wrong dates for the supply of electricity and for the dates of completion;

(c) the plaintiffs could only apply to restrain the defendants from receiving the stakeholder's fund of the relevant plaintiffs whose money was with one of the six entities;

(d) the order on 15 June 1989 was causing hardship to the defendants as all the six entities had refused to pay any money to the defendants resulting in them not being able to proceed with further construction work;

(e) Order 29 r. 1(a) of the Rules of the High Court 1980 (hereinafter "the rules") had not been complied with as the injunction was not in Form 58;

(f) the plaintiffs had admitted that there were two triable issues namely whether the booking dates can be the dates of the agreements and whether interest should be paid on the premature release of the final amount; and

(g) the signatures of the remaining plaintiffs on the list and in the agreements were not be same.

On the first point, I disagreed with learned Counsel for the defendants as O. 15 r. 12(1) of the rules clearly states that where numerous persons have the same interest in any proceedings, not being proceedings concerning the administration of the estate of a deceased person, property subject to a trust, or the construction of a written instrument, including a statute, in which situations different considerations apply, they may be begun, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

In the *Duke of Bedford v. Ellis & Ors.* [1901] AC 1, the House of Lords had held, where several plaintiffs has sued, on behalf of themselves and all other growers of fruit, flowers, vegetables, roots and herbs within the meaning of the Covent Garden Act 1828, to enforce

various preferential rights to stands in the market which they alleged to have been given to their class of grower by the Act, against the defendant who was the lord of the market, that without prejudging the construction of the Act, the plaintiffs had an interest in common and that the defendant was not entitled to have the action stayed either on the ground that the plaintiffs had no beneficial proprietory right or that the joinder of plaintiffs claiming separate and different rights under the Act, both personally and as representing a class, would embarass or delay the trial. This case was distinguished in *Smith & Ors. v. Cardiff Corporation* [1954] 1 QB 210 CA, where the facts were that the defendant, a local authority, had decided that in order to fulfil their financial obligations under the Housing Act 1936 they had to increase the rents payable by the tenants not uniformly but upon a differential basis according to the incomes of the defendants resulting in the lower paid ones not suffering any increase. Four of the tenants sued on their behalves and that of the other tenants claiming that the increase was *ultra vires*. It was held on appeal that to bring a representative action under O. 16 r. 9 of the English Rules of the Supreme Court (on which our O. 15 r. 12 is based), it must be shown that all the members of the class had a common interest, that they had a common grievance and that the relief was in its nature beneficial to them all. On these facts, the Court found, quite correctly I might add, that the second and third qualifications had not been fulfilled and held that the action could not proceed as a representative action but as an action brought by four individuals.

In *Market & Co. Ltd. v. Knight Steamship Co. Ltd.* [1910] 2 KB 1021, the plaintiffs had shipped goods on a general ship belonging to the defendants for a voyage from New York to Japan. However, both the ship and cargo were sunk by a Russian cruiser on the ground that the ship was carrying contraband of war. In their action, the plaintiffs sued on behalf of themselves and forty-four other persons, firms and companies who had also shipped goods on board the ship. By a two to one majority, the Court ruled that shippers of goods in a general ship could not have the same interest in one cause or matter and no representative action could lie where the sole relief sought was damages. This was followed in the local case of *Atip bin Ali v. Josephine Doris Nunis & Anor.* [1986] CLJ (Rep) 283 where the Court held that a representative action is not normally allowed to establish the right of numerous persons to recover damages as the sole relief claimed but then that was a defamation action and the finding certainly cannot be applied here.

In the circumstances of our present case, I was satisfied that the plaintiffs were members of the same class, had a common grievance and that the relief sought was in its nature beneficial to all whom the plaintiffs represented and the representative action could therefore continue although the amounts due to each of them may well be different in view of the different dates involved.

However, as pleaded in the statement of claim at para. 9, the six entities are holding the last 5% "or thereabouts" of the purchase price and para. (b) of the prayers had asked that the said amounts be paid to the respective plaintiffs towards the account of the claims. As for para. (a) of the prayers where the plaintiffs had prayed for the total sum of RM498,733.20, this had yet to be adjudicated upon and I saw no reason why all the six entities had to be restrained from handing over to the defendants this sum if the amount that can be set off from the plaintiffs' claim for liquidated damages for late delivery of their houses should only be the 5% with the stakeholders. In fact, all the relevant correspondence exhibited by the first plaintiff in applying for the injunction had stated only the sum of RM2,000 per purchaser as regards the stakeholder's fund which is correct for houses costing RM40,000 although the list annexed to the statement of claim had given a number of purchase prices above the said amount. To my mind, the plaintiffs were only entitled to set off the stakeholder's amount

proportionate to 5% of the purchase price and not the whole amount that they at this stage think they are entitled to for late delivery of the houses. It is for the defendants to pay the difference to the plaintiffs only after the alleged amounts have been ascertained at a trial. The principle of set off in the circumstances had in fact been given judicial recognition in *SEA Housing Corporation Sdn. Bhd. v. Lee Poh Choo* [1982] CLJ (Rep) 305, *Loh Wai Lian v. SEA Housing Corporation Sdn. Bhd.* [1987] 2 MLJ 1 and *Kandasamy a/l Sreenivasagam v. Syarikat Muzwina Development Sdn. Bhd.* [1990] 1 MLJ 15.

There was also no evidence that there was a risk of dissipation of assets by the defendants who in carrying out this housing project had in fact no problem with the other 200 odd purchasers. Moreover, restraining them from getting the monies due from the six entities in excess of the stakeholder's amounts would have the effect of a slow down in their activities or possibly a complete standstill in operations making it more difficult for the defendants to pay any damages for late delivery.

In the circumstances, I dismissed the application to totally set aside the injunction but ordered that it should be varied to the extent that each entity should only keep 5% of the purchase price for each purchaser plaintiff whose stake is with them and directed the learned Senior Assistant Registrar to assess damages, if any, sustained by either party by virtue of the variation. Each party was ordered to bear its own costs.

Also found at [1990] 1 CLJ 1010